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NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

EDWARD J. WOODRUFF and MARY C. WOODRUFF,
Petitioners,

v.

PEGGY DOREEN ANGUS, next friend of
TRACY ANGUS, SUSAN ROSE WATERS CASE
next friend of CYRUS M. WATERS
and the SITKA COMMUNITY ASSOCIATION,
Respondents.

ON WRIT OF CERTIORARI TO
THE OREGON COURT OF APPEALS

BRIEF OF RESPONDENT, SITKA COMMUNITY ASSOCIATION, IN OPPOSITION TO THE PETITION FOR CERTIORARI

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TABLE OF CONTENTS

Table of Authorities ii

Statement of the Case 1

Summary of Argument 4

Argument

I. The Indian Child Welfare Act is a Valid Exercise of Congressional Authority 5

A. The Act is Constitutional if Congress had a "Rational Basis" for Its Enactment 6

B. The Act is a Reasonable Response by Congress to a Recognized Crisis in Indian Family Welfare . 7

II. The Indian Child Welfare Act does not Unconstitutionally Discriminate 8

A. The Indian Child Welfare Act does not Violate Equal Protection 9

B. The Status of the Child as an Indian, even if Characterized as a Racial Classification, is a Valid Consideration in Adoption 12

III. Conclusion 14

TABLE OF AUTHORITIES

Cases

Compos v. McKeithen, 342 F. Supp 264 (E.D. La. 1972) 13, 14

Delaware Tribal Business Committee v. Weeks, 430 U.S. 73 (1977) 6

Fisher v. District Court, 424 U.S. 382 (1976) 10

Drummond v. Fulton County Family and Children's Services, 563 F.2d 1200 (5th Cir. 1977), cert. denied, 437 U.S. 910 (1978) 13

Loving v. Virginia, 388 U.S. 1 (1966) 11

Morton v. Mancari, 417 U.S. 535 (1974) 5, 6, 9, 10, 11

United States v. Antelope, 430 U.S. 641 (1977) 9, 10

Statutes

Indian Child Welfare Act, 25 U.S.C. §1901 et seq. ..... passim

Oregon Revised Statutes §109.070 ... 1

Legislative History

H.R. REP NO. 95-1386, 95th Cong., 2d Sess. 9, reprinted in [1978] U.S. Cong. Code and Ad. News 7530, 7531 ..... 7, 8

STATEMENT OF THE CASE

An invalid consent to the adoption of the child who is the subject of this proceeding was given by his mother, Tracy Angus, three days after his birth. Tracy is a member of the Sitka Community Association, a federally recognized Indian tribe. The consent was invalid under the Indian Child Welfare Act, 25 U.S.C. §1901 et seq.[1/] The father, Cyrus Waters, an enrolled member of the Nez Perce Tribe, did not sign a consent. His paternity had not been acknowledged nor established at that time and his consent was not necessary under Oregon law. Oregon Revised Statutes, 109.070 et seq.

[1/] In relevant part, Section 1913(a) of the Act provides as follows:

> Any consent given prior to, or within ten days after birth of the Indian child shall not be valid. [Emphasis added.]

In March, 1982, upon learning of the invalidity of the consent, Tracy Angus sought return of her child. The Petitioners refused. On April 2, 1982, Cyrus Waters, acknowledged paternity. On May 6, 1982, prior to the adoption becoming final, the parents formally revoked their consent and filed a Habeas Corpus proceeding demanding return of the child.

The trial court found that Tracy Angus and Cyrus Waters, and their child, were entitled to the protection of the ICWA. It found that the original consent given by Tracy Angus was invalid and ordered the child returned. The court also found that Tracy had revoked and withdrawn her consent. The court's order was stayed, pending appeal.

The trial court's decision was affirmed by the Oregon Court of Appeals. On March 1, 1983, the Oregon Supreme

Court denied a Petition for Review.

On March 9, 1983, prior to the expiration of the stay, a separate proceeding was filed in Multnomah County Circuit Court requesting the court to assume jurisdiction of the child on separate grounds. On March 15, 1983, the court transferred jurisdiction of the child to the Sitka Community Association Tribal Court upon its request. On April 14, 1983, the child was made a ward of the tribal court and ordered returned to his parents. On April 16, 1983, the child was returned.

SUMMARY OF ARGUMENT

The Indian Child Welfare Act is a lawful exercise of Congress' power in Indian affairs. It is a rational response to the legitimate objective of protecting the welfare of Indian families and tribes. It singles out Indians for special treatment based on their political status as members of quasi-sovereign tribes with a special relationship to the United States. The Act does not discriminate based on race.

Even if race is relevant, its consideration does not violate the Constitution as long as it is not used to prohibit interracial adoptions. Thus, consideration of the Indian status of a child under the ICWA does not create a constitutional issue.

ARGUMENT

I. THE INDIAN CHILD WELFARE ACT IS A VALID EXERCISE OF CONGRESSIONAL AUTHORITY.

This Court often has recognized that exercise of the broad power of Congress to pass laws for the benefit of Indians as a separate class of citizens does not violate the Constitution.[2/] Under the numerous cases upholding this principle, the Petitioners' request for review of the constitutionality of the

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2/ In Morton v. Mancari, 417 U.S. 535 (1974), in a comment regarding special Indian legislation, the Court noted that, "[i]f these laws, derived from historical relationships and explicitly designed to help only Indians, were deemed invidious racial discrimination, an entire title of the United States Code (25 U.S.C.) would be effectively erased and the solemn commitment of the Government toward the Indians would be jeopardized." 417 U.S. at 552.

Indian Child Welfare Act, 25 U.S.C. §1901 et seq., is without basis.

A. The Act is Constitutional if Congress had a "Rational Basis" for Its Enactment.

The Court has established a plain, easily applied standard under which the constitutionality of Indian legislation is to be judged. In Morton v. Mancari, 417 U.S. 535 (1974), the Court held that such legislation would be upheld as long as it can be "tied rationally to the fulfillment of Congress' unique obligation toward Indians." 417 U.S. at 555; Delaware Tribal Business Committee v. Weeks, 430 U.S. 73, 85 (1977). Under the foregoing standard, the Indian Child Welfare Act unquestionably is constitutional.

B. The Act is a Reasonable Response by Congress to a Recognized Crisis in Indian Family Welfare.

Through extensive hearings in the mid-1970's, Congress became aware of the extremely high rates of Indian family separations which could not be explained rationally. The magnitude of the problem was noted in the report of the House, which stated that "[t]he wholesale separation of Indian children from their families is perhaps the most tragic and destructive aspect of American Indian life today." H.R. REP. NO. 95-1386, 95th Cong., 2d Sess. 9, reprinted in [1978] U.S. Cong. Code & Ad. News 7530, 7531.3/

3/Surveys of States with large Indian populations conducted by the Association on American Indian Affairs (AAIA) in 1969 and again in 1974 indicate that approximately 25-35 percent of all

With the foregoing justification, Congress took reasonable steps to provide "minimum federal standards and procedural safeguards in State Indian child custody proceedings designed to protect the rights of the child as an Indian, the Indian family and the Indian tribe." Id. at 19.

II. THE INDIAN CHILD WELFARE ACT DOES NOT UNCONSTITUTIONALLY DISCRIMINATE

This Court, on several occasions and in various contexts, has addressed the argument that the exercise of congressional authority in Indian affairs results in unlawful discrimination. In each instance,

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(3/ continued)

Indian children are separated from their families and placed in foster homes, adoptive homes, or institutions. [H.R. REP. NO. 95-1386, 95th Cong. 1st Sess. 9 (1978).]

legislation which subjects Indians to separate treatment has been upheld.

A. The Indian Child Welfare Act does not Violate Equal Protection.

This Court often has noted that legislation singling out Indians for separate treatment is not directed toward a racial class but, rather, a political class. Thus, such legislation does not violate "equal protection" as long as it is rationally related to the federal government's obligation to Indians. Morton v. Mancari, 417 U.S. 535 (1974).

Petitioners apparently contend, at least in part, that the foregoing principle applies only to federal legislation directly promoting tribal self-government. That contention was rejected in United States v. Antelope, 430 U.S. 641 (1977). In the Antelope

case, the Court noted that previous rulings upholding the political v. racial distinction had involved tribal self-regulation. The legislation in question in the Antelope case, however, dealt strictly with federal regulation of individual Indians' criminal conduct, which only implicated broader Indian interests. The Court specifically held that such regulation is permissible.

> But the principles reaffirmed in Mancari [417 U.S. 535 (1974)] and Fisher [Fisher v. District Court, 424 U.S. 382 (1976)] point more broadly to the conclusion that federal regulation of Indian affairs is not based upon impermissible classifications. Rather, such regulation is rooted in the status of Indians as "a separate people" with their own political institutions. Federal regulation of Indian tribes, therefore, is governance of once-sovereign political communities; it is not to be viewed as legislation of a "'racial' group consisting of 'Indians'...." [430 U.S. at 646]

The foregoing makes clear that any exercise of congressional authority over Indian affairs must be judged under the "rational basis" test set forth in the Mancari case.[4/] Application of the more strict, equal protection analysis reserved for cases involving racial discrimination is inappropriate.[5/]

[4/] This principle applies only to Indians with a political relationship with the United States, e.g. federally recognized tribes. The Indian Child Welfare Act concerns only those Indians who are members of federally recognized tribes.

[5/] Petitioners rely almost exclusively on Loving v. Virginia, 388 U.S. 1 (1966) to support their contentions. For the reason set forth above, this reliance is wholly misplaced. Furthermore, Loving can be distinguished because it involved clear "invidious racial discrimination" for which the Court could find "no legitimate overriding purpose." Id. at 11. It involved marriage which the Court held to be one of the "basic civil rights of man." Id. at 12. In their brief, Petitioners fail completely to show any interests at stake which would make the Loving case applicable here.

B. The Status of the Child as an Indian, Even if Characterized as a Racial Classification, is a Valid Consideration in Adoptions.

Even assuming the petitioners legitimately could support the argument that the Indian Child Welfare Act singles out Indians based on race, they have not shown that it would violate equal protection. The Act attempts to protect legitimate interests of the child, parents and tribe which relate to the Indian status of the child. The protection of these interests has made the adoption of Indian children by non-Indians more difficult but not prohibitive. Race is a legitimate consideration in adoption placements as long as it is not used to prohibit interracial adoptions.

A recent case, Drummond v. Fulton County Family and Children's Services, 563 F.2d 1200 (5th Cir. 1977), cert. denied, 437 U.S. 910 (1978), specifically upheld the constitutionality of race as a consideration in adoptions. The Fifth Circuit rejected equal protection and due process challenges to a county adoption agency's refusal to permit a white couple to adopt a black child. The court stated as follows:

> ...no case has been cited to the Court suggesting that it is impermissible to consider race in adoption placement. The only cases which have addressed this problem indicate that, while the automatic use of race is banned, the use of race as one of the factors in making the ultimate decision is legitimate. [Citations omitted] [Id. at 1205]

The cases cited by Petitioners are in accord with the foregoing. For example, in Compos v. McKeithen, 342 F.

Supp. 264 (E.D. La. 1972) the court approved race as a relevant factor in an adoption. The court stated as follows:

> ...we regard the difficulties inherent in interracial adoptions as justifying consideration of race as a relevant factor in adoption, and not as justifying race as the determinative factor. [Id. at 266]

Thus, the issue of race in this adoption has relevance, if at all, only as a legitimate factor that should be considered in adoptive placements. Thus, no constitutional issue has been raised by Petitioners.

III. CONCLUSION

The Indian Child Welfare Act is a legitimate exercise of Congress' power to legislate on behalf of Indians. It singles out Indians for special treatment based on their political relationship with the United States rather than their racial status. As

such, the Act is subject to the "rational basis" test, not the "strict scrutiny" test reserved for racial classifications. Because the Act was passed in response to a demonstrated crisis in Indian family welfare, it clearly is constitutional.

Furthermore, even if the Act does distinguish Indians based on their race, the consideration of race in an adoption proceeding does not violate the principle of equal protection. The Act does not prohibit adoption of Indian children by non-Indians but merely requires that the Indian status of a

child be considered. For these reasons, no constitutional issues are at stake in this matter and the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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